Msimanga Lesaly v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K–05–29 1999
GOPAL SRI RAM, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH JJCA
28 SEPTEMBER 2004

Criminal Law — Dangerous Drugs — Trafficking — Presumption — Whether presumption of possession under s 37(d) can be used to invoke presumption of trafficking under s 37(da) — Whether trial judge infringed rule against double presumptions — Dangerous Drugs Act 1952 s 37(d) & (da)

Criminal Procedure — Appeal — Charge defective — Whether charge bad in law — Appellant initially charged with another person with offence of trafficking in dangerous drugs — Charge carried in it allegation that two accused had acted in furtherance of a common intention under s 34 of the Penal Code — Charge amended to reflect fact that appellant had solely trafficked in drug in question — Whether appellant misled or prejudiced

Criminal Procedure — Statements — Cautioned statement — Appellant's cautioned statement excluded on application of co-accused — Whether appellant prejudiced — Whether co-accused can object to admission of appellant's cautioned statement — Whether trial judge had discretion to exclude appellant's cautioned statement

The appellant, a Nigerian national was charged for an offence of trafficking 686.3 grams of heroin. She was convicted of an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act') and sentenced to the mandatory death sentence. She appealed. The conviction was attacked on four main grounds. First, the charge as amended at the close of the prosecution's case was defective. Second, although the amended charge was read to the appellant, there was non-compliance with the second limb of s 159 and s 162 of the Criminal Procedure Code ('the CPC'), when read together. Third, the High Court was wrong in excluding the appellant's cautioned statement on the application of the co-accused and that the appellant had thereby been prejudiced. Fourth, the learned High Court judge had infringed the rule against double presumptions, ie, the learned judge had resort to s 37(d) of the Dangerous Drugs Act 1952 ('the Act') to presume possession and relied on that presumed possession to invoke the further presumption under s 37(da) to hold that the appellant was a trafficker in the particular proscribed drug.

Held, dismissing the appeal:

(1) The appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell. The charge had to be amended to

reflect the fact that the appellant had solely trafficked in the drug in question. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That did not render the charge bad. Section 34 of the Penal Code did not create a substantive offence but was merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons (see para 4); *Chota bin Abdul Razak v PP* [1991] 3 MLJ 77 followed.

(2) The appellant was not misled or prejudiced by the minor defect in the wordings in the charge. The way in which her defence was presented makes it clear that she fully appreciated the nature of the charge against her and, more importantly, the nature of the prosecution's case (see para 5).

(3) Where an accused was represented by counsel it was unnecessary for the court to draw counsel's attention to s 162 of the CPC or to inquire whether counsel intended to exercise the right conferred by that section (see para 8).

(4) A co-accused cannot object to the admission of such evidence on the ground that it implicates him in the commission of the offence. The discretion to exclude is reserved against the prosecution: it has no application where an accused seeks admission of prejudicial evidence against a co-accused. Accordingly, the statements made by the appellant, both oral and reduced into writing since they were exculpatory were clearly relevant and admissible. It was of no consequence that parts or all of those statements were prejudicial to the co-accused. The trial judge had no discretion whatsoever in the matter on that ground to exclude them (see para 15).

(5) It was clear beyond a reasonable doubt that the appellant was transporting the heroin from Thailand to this country. There was no suggestion that it was for her personal consumption. The compelling inference was that her purpose in transporting the drug was to convey it to someone else either the actual consumer or a distributor or another dealer. Nothing in the appellant's testimony went anywhere near to rebutting this natural inference, arising independent of any presumption under the Act (see para 29); *Ong Ah Chuan v PP* [1981] 1 MLJ 64 followed.

[**Bahasa Malaysia summary**

Perayu, seorang warganegara Nigeria dituduh melakukan kesalahan mengedar 686.3gram heroin. Tertuduh disabitkan untuk kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu') dan dijatuhkan hukuman mati mandatori. Tertuduh merayu. Sabitan itu dicabar atas empat sebab utama. Pertama,

bahawa pertuduhan yang dipinda pada penutup kes pendakwa adalah defektif. Kedua, walaupun pertuduhan yang dipinda telah dibaca kepada perayu, terdapat ketidakpatuhan dengan cabang kedua s 159 dan s 162 Kanun Acara Jenayah ('KAJ'), semasa dibaca bersama. Ketiga, Mahkamah Tinggi salah apabila mengecualikan pernyataan beramaran perayu atas permohonan tertuduh bersama dan oleh itu perayu diprejudis. Keempat, hakim Mahkamah Tinggi yang arif telah bercanggah dengan rukun 'double presumption'. Iaitu apabila hakim yang arif menggunakan s 37(d) Akta itu untuk menganggapkan milikan dan seterusnya berdasarkan anggapan milikan itu membangkitkan anggapan di bawah s 37(da) untuk memutuskan bahawa perayu merupakan seorang pengedar dadah jenis itu.

Diputuskan, menolak rayuan itu:

(1) Perayu pada mulanya dituduh dengan seorang lagi. Sewajarnya, pertuduhan itu mengandungi penuduhan bahawa kedua-dua tertuduh telah berlaku dengan niat bersama di bawah s 34 Kanun Keseksaan. Apabila tertuduh bersama dibebaskan pada penutup kes pendakwa, penuduhan untuk niat bersama gagal. Penuduhan itu terpaksa dipinda untuk menunjukkan bahawa perayu seorang sahaja yang mengedarkan dadah tersebut. Tetapi perkataan-perkataan dalam penuduhan itu tidak dipinda dengan betul dan masih membuat referens kepada elemen niat bersama. Ini tidak membuat penuduhan tersebut salah. Seksyen 34 Kanun Keseksaan tidak membangkitkan kesalahan yang substantif tetapi hanya satu rukun keterangan untuk infer tanggungan bersama untuk satu kelakuan jenayah yang dilakukan oleh beberapa orang (lihat perenggan 4); *Chota bin Abdul Razak v PP* [1991] 3 MLJ 77 diikut.

(2) Perayu tidak disalah arah atau perjudis kerana satu kesilapan yang kecil dalam perkataan-perkataan dalam penuduhan itu. Cara di mana pembelaannya dihujahkan menjelaskan bahawa tertuduh jelas memahami keadaan penuduhan terhadapnya dan lebih penting lagi, keadaan kes pendakwa (lihat perenggan 5).

(3) Di mana seorang tertuduh diwakili oleh peguam, mahkamah tidak perlu membawa perhatian peguam kepada s 162 KAJ atau bertanya sama ada peguam bertujuan menggunakan hak yang diperuntukkan oleh seksyen itu (lihat perenggan 8).

(4) Tertuduh bersama tidak boleh membantah kepada penerimaan keterangan ini atas sebab bahawa ia memudaratkannya dalam kelakuan kesalahan itu. Budi bicara sama ada untuk mengecualikan adalah milik pendakwa: ia tidak mempunyai aplikasi di mana seorang tertuduh ingin memasukkan keterangan prejudisial terhadap tertuduh bersama, maka pernyataan perayu secara lisan atau bertulis yang merupakan penyataan yang 'exculpatory' adalah releven dan boleh diterima. Ia tidak menyebabkan sebahagian atau keseluruhan pernyataan itu prejudis

terhadap tertuduh bersama. Hakim pembicaraan tiada budi bicara dalam perkara ini untuk mengecualikannya (lihat perenggan 15).

(5) Ia adalah jelas dibuktikan tanpa keraguan bahawa perayu telah membawa dadah dari Thailand ke negara ini. Tiada cadangan bahawa ia adalah untuk kegunaan sendiri. Inferens yang kuat adalah tujuannya membawa masuk dadah itu untuk diberikan kepada orang lain sama ada sebagai pengguna sendiri, pemborong atau penjual. Tiada apa-apa dalam testimoni perayu di luar sebarang anggapan di bawah Akta itu yang dapat menidakkan inferens yang membangkit ini (lihat perenggan 29); *Ong Ah Chuan v PP* [1981] 1 MLJ 64 diikut.]

Notes

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 112–120.

For a case on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 240.

For cases on cautioned statements, see 7(2) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 2273–2285.

Cases referred to

Chota bin Abdul Razak v PP [1991] 3 MLJ 77 (folld)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Cohen Lorraine Phillis & Anor v PP [1989] 3 MLJ 289 (refd)
Goi Ching Ang v PP [1991] 1 MLJ 507 (refd)
Lim Yow Choon v PP [1972] 1 MLJ 205 (refd)
Lobban v The Queen [1955] 1 WLR 877 (refd)
Looi Kow Chai v PP [2003] MLJ 65 (refd)
Moosa Abdul Rahiman v The State of Kerala [1982] Cr LJ 1384 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (folld)
PP v Datuk Haji Harun bin Idris [1977] 1 MLJ 14 (refd)
PP v Mohamed Noor bin Jantan [1979] 2 MLJ 289 (refd)
Queen-Empress v Jargrup (1885) ILR 7 All 646 (refd)
R v Miller [1952] 36 Cr App R 169 (refd)
Teh Thiam Huat v PP [1996] 3 SLR 631 (refd)

Legislation referred to

Criminal Procedure Code [Ind] s 217
Criminal Procedure Code ss 159, 162
Dangerous Drugs Act 1952 ss 37A, (d), (da), 39B
Evidence Act 1950 ss 17(2), 30
Misuse of Drugs Act 1973 [Sing]
Penal Code s 34

Appeal from: Ciminal Case No 45–11 of 1997 (High Court, Alor Setar)

Zainal bin Ithnin (Zainal Ithnin & Partners) for the appellant.
Kamaruzaman bin Abd Jalil (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The appellant, a Nigerian national was charged for an offence of trafficking 686.3 grams of heroin. She was convicted of an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act') and sentenced to the mandatory death sentence. She appealed. We heard her appeal on 8 September 2004 and dismissed it. Our reasons now follow.

[2] The appellant and another person boarded a taxi at Haadyai in Thailand. They were headed for Penang. There were two other passengers on board. When the taxi arrived at the Malaysian immigration and customs check point at Bukit Kayu Hitam all passengers alighted. Their passports were examined. There was nothing suspicious about them. At that point, PW4, a customs officer asked the appellant to remove her slippers. Obviously his suspicions were aroused when he found them fairly heavy. The slippers were probed with a needle and traces of a white powdery substance were found. The slippers were then split open and from them were recovered a total of six packets of a white powdery substance. The appellant was searched. Five more packets of a white powdery substance were found around her waist. The appellant and her companion were arrested. Subsequent chemical examination and analysis revealed that the 11 packets contained heroin weighing 686.3 grams. The appellant and her companion were charged. At the ensuing trial the latter was acquitted. However, the learned trial judge Hishamuddin J, in a carefully considered judgment convicted the appellant and passed sentence of death.

[3] Before us the conviction was attacked on four main grounds. First, the charge as amended at the close of the prosecution's case was defective. Second, although the amended charge was read to the appellant, there was non-compliance with the second limb of s 159 and s 162 of the Criminal Procedure Code when read together. Third, the judge was wrong in excluding the appellant's cautioned statement on the application of counsel for the co-accused and that the appellant had thereby been prejudiced. Fourth, the learned judge had infringed the rule against double presumptions.

[4] Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell

to the ground. The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77. In *Teh Thiam Huat v Public Prosecutor* [1996] 3 SLR 631, the same complaint was raised on appeal. Karthigesu JA dealt with it as follows:

> We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the 40 sachets of heroin and that he failed to make good that he was in possession of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that section 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility (per Thean J (as he then was) in *Chota bin Abdul Razak v PP* [1991] 3 MLJ 77; [1991] SLR 675). Accordingly there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

[5] Further, we have scrutinised the charge and the record of proceedings with care and we are satisfied that the appellant was in no way misled or prejudiced by the minor defect in the wordings in the charge. The way in which her defence was presented makes it amply clear that she fully appreciated the nature of the charge against her and, more importantly, the nature of the prosecution's case. It appears quite plain from her evidence both in chief and under cross examination that she knew without any difficulty whatsoever the case she had to meet. We are therefore satisfied that the error in the charge did not cause any prejudice or injustice whatsoever to the appellant. The first ground therefore fails.

[6] Since the second ground of complaint relates to the violation of ss 159 and 162 of the Criminal Procedure when read together, it is best that we set out these provisions in full. They read as follows:

> 159 If a charge is framed or alteration or addition made under either of the last two preceding sections, the court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered or added charge. If the accused declares that he is not ready, the court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such charge or

alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.

162 Whenever a charge is altered or added by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[7] Learned counsel's submission is that the trial judge was obliged to inform the appellant of her right under s 162 to recall any of the witnesses for the prosecution. And this though the appellant was represented by counsel. With respect we are unable to agree with this submission. In *Moosa Abdul Rahiman v The State of Kerala* [1982] Cr LJ 1384, the full bench of the High Court of Kerala held that s 217 of the Indian Criminal Procedure Code 1974 which is in pari materia with our s 162:

> does not cast a duty or obligation on the court to enquire of the prosecution or the accused whether they would like to recall or re-summon the witnesses ... or to call any further witnesses. The omission of the court to 'enquire of the prosecution or the accused whether they would like to exercise the right of re-calling or re-summoning the witnesses would not result in any procedural illegality'.

[8] With respect we agree with this proposition. Where an accused is represented by counsel it is unnecessary for the court to draw counsel's attention to s 162 or to inquire whether counsel intends to exercise the right conferred by that section. We therefore find no merit in the second ground advanced on the appellant's behalf.

[9] The third ground of complaint is a little more substantive and requires a narrative. The appellant had, after her arrest made some oral statements in the presence of PW6, a customs officers at the scene. She had also made a cautioned statement under s 37A of the Act after her arrest. Counsel for the appellant wanted both statements to be admitted because they were exculpatory of the appellant, though inculpatory of the co-accused. In respect of the oral statements, he attempted to cross-examine PW6. But counsel for the co-accused objected. The learned judge upheld the objection and disallowed the appellant's proposed line of cross-examination on the ground that the appellant had not been properly cautioned and that therefore anything she said was inadmissible even at the behest of the defence.

[10] With respect we are unable to agree with the learned judge. In our judgment where a statement is not recorded in accordance with the provisions of law, it is only inadmissible if the accused objects to its admissibility but not otherwise. In *Public Prosecutor v Mohamed Noor bin Jantan* [1979] 2 MLJ 289, the Federal Court speaking through Suffian LP held that:

A It is true that the general rule is that a cautioned statement is admissible only if the court is satisfied that it was made voluntarily, and if it is suggested by the defence that it has not been so made, a trial within a trial should be held — so that the prosecution can satisfy the court that the opposite is the case. But if, on the other hand, the defence does not challenge the voluntary nature of the statement, there is no reason whatsoever for holding a trial within a trial.

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[11] The juridical basis for the foregoing conclusion is not difficult to find. Rules governing the admissibility of evidence are procedural and not substantive: See *Public Prosecutor v Datuk Haji Harun bin Idris* [1977] 1 MLJ 14. Hence, a rule against admissibility of evidence is a procedural safeguard to C ensure that an accused receives a fair trial and is therefore available for use in the accused's favour, whether he avails of it or not. So, we have the rule that in a criminal case, inadmissible evidence remains inadmissible even if the accused does not object to it. It is therefore no infringement of an accused's procedural rights if the accused waives any breach of s 37A (or the procedural D equipollent in any other statute) and asks for the admission of a statement recorded from him or her. All it means is that the accused does not choose to assert a procedural objection fairly open to him or her. Once admitted, the statement may be put to such use as is lawfully permitted. It does not mean, of course, as we shall later demonstrate that the court must swallow the E accused's statement hook, line and sinker.

[12] At common law an accused is always entitled to have relevant evidence adduced in his or her favour, notwithstanding that such evidence may be adverse to a co-accused. Evidence that goes to show that an accused is not F guilty of an offence or that raises a reasonable doubt as to his or her guilt is highly relevant and admissible. A co-accused cannot object to the admission of such evidence on the ground that it implicates him in the commission of the offence. Thus, in *R v Miller* [1952] 36 Cr App R 169, where two persons were accused of evading import duties, Devlin J allowed an accused to cross-examine a witness called by the co-accused to show that the co-accused had G spent time in prison. The relevance of this evidence was that it went to show that the co-accused was principally liable for the importations which supported the accused's case that he had not been involved in the offences charged. It so happened that in Miller the witness in question was called by the co-accused. But we cannot see that there is any difference in principle H where the witness is one called by the prosecution.

[13] It is a well settled principle of law that a trial judge has a discretion to exclude evidence the prejudicial effect of which outweighs its probative value: *Goi Ching Ang v Public Prosecutor* [1991] 1 MLJ 507. The existence of the I discretion and its role where there is more than one accused person on trial was stated by Lord Steyn when delivering the advice of the Privy Council in *Lobban v The Queen* [1955] 1 WLR 877 as follows:

(A) trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value.

This power has probably existed since *R v Christie* [1914] AC 545 but, in any event, it was expressly affirmed by the House of Lords in *R v Sang* [1979] 2 All ER 1222, [1980] AC 402. The power is based on a judge's duty in a criminal trial to ensure that a defendant receives a fair trial. The width of the discretion is circumscribed by the purpose for which it exists. This common law discretion is the foundation of a judge's power to cause part of a written statement made by a defendant, which is adduced in evidence by the prosecution, to be edited in the interests of justice. It is wide enough to allow a trial judge to exclude evidence, which is tendered by the prosecution in a joint trial and is probative of the case against one co-defendant, on the ground that it is unduly prejudicial against another co-defendant. *R v Rogers and Tarran* [1971] Crim LR 413 was such a case. In such cases it is in the interests of both defendants that the disputed part of the document be edited: the distinctive feature of the present case is that there was a conflict between co-defendants as to editing.

[14] The Judicial Committee, however, recognised a second and equally important principle. The discretion to exclude is reserved against the prosecution: it has no application where an accused seeks admission of prejudicial evidence against a co-accused. In his judgment Lord Steyn quoted a passage from Keane's *Modern Law of Evidence* (3rd Edn, 1994) p 36 the part of which is relevant for present purposes reads as follows:

... the discretion may only be exercised in relation to evidence tendered by the prosecution. There is no discretion to exclude, at the request of one co-accused, evidence tendered by another. Thus although, as we have seen, there is a discretion to exclude similar fact evidence tendered by the prosecution, such evidence, when tendered by an accused to show the misconduct on another occasion of a co-accused is, if relevant to the defence of the accused, admissible whether or not it prejudices the co-accused.

[15] Accordingly, the statements made by the appellant, both oral and reduced into writing since they were exculpatory were clearly relevant and admissible. It was of no consequence that parts or all of those statements were prejudicial to the co-accused. The trial judge had no discretion whatsoever in the matter on that ground to exclude them. We have made these observations because there are passages in the learned judge's judgment that are certainly open to the interpretation that one of the grounds on which he excluded the appellant's statements was because of their prejudicial effect upon the co-accused's case.

[16] There is a further point that we consider to be of some importance. It is this. The only circumstance in which the appellant's statements could have been used by the prosecution against her co-accused is that set out in s 30 of the Evidence Act 1950. It is a most familiar section to the criminal bar. Yet, because of its peculiar significance in the present instance we think it best that we remind ourselves of it. And this is what it says:

> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.

[17] One of the essential requirements of the section is that the statement of an accused in order to be taken into consideration against a co-accused is that it must be a confession. And a confession is defined by s 17(2) of the Evidence Act 1950 as follows:

> A confession is an admission made at any time by a. person accused of an offence, stating or suggesting the inference that he committed that offence.

[18] Now, by no stretch of the imagination can the appellant's statements be described as confessions. They were purely exculpatory statements. Hence they could not possibly have been taken into consideration against the co-accused in the present case. The point is amply covered by authority and we do not consider it necessary to go beyond referring to the following passage in Straight J's judgment in *Queen-Empress v Jargrup* (1885) ILR 7 All 646:

> What was intended was, that where a prisoner — to use a popular phrase — 'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in s 30 cannot be construed as including a merely inculpatory admission which falls short of being an admission of guilt.

[19] To sum-up, the fact that s 37A was not complied with or the fact that the appellant's statements were prejudicial to her co-accused were not sufficient reasons in law for ruling her statements inadmissible as it was the appellant who was seeking their admission. We are therefore respectfully of the view that the learned judge was in error in not admitting her cautioned statement and in disallowing her cross-examination of PW6.

[20] The next question to ask is whether the refusal by the learned judge to admit the appellant's statements has rendered her conviction unsafe. The learned deputy who argued the case for the respondent submitted that there has been occasioned no substantial miscarriage of justice in the circumstances of the case by reason of the learned judge's ruling on the evidential point. Having given this matter our most anxious consideration we are in agreement with that submission.

[21] The appellant's evidence on oath is in substance the same as her earlier out of court statements, in particular, her cautioned statement. It is clear from

the record that she was unable to withstand the cross-examination directed at her. At the end of the day, the learned judge found her evidence not to raise a reasonable doubt in his mind. So, her previous out of court statements could have added nothing further to her evidence. The fact that they were also exculpatory is neither here nor there on the peculiar facts of this case because the learned judge found her wanting in credibility. And, having read and re-read her printed evidence we find her story as told in her evidence and in her cautioned statement to defy credibility.

[22] The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case. And, the mere fact that an accused's evidence is consistent with his or earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts. But we would in the context of this case cite *Lim Yow Choon v Public Prosecutor* [1972] 1 MLJ 205 where it was held that:

> notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there were facts in the cautioned statement which appeared to contradict other parts of the evidence led by the prosecution, it was open to the trial judge as a judge of facts to assess the evidence and in so doing accept part of it and reject the rest.

[23] Having considered the evidence on record in totality, we are satisfied that any reasonable tribunal armed with the facts in this case would have come to the same conclusion as the learned trial judge about the weight to be given to the appellant's evidence. The non-admission of the appellant's cautioned and other statements would in our view have made no difference whatsoever to the final result.

[24] We now turn to the final ground of appeal. The complaint here is that the learned judge had resort to s 37(d) of the Act to presume possession and relied on that presumed possession to invoke the further presumption under s 37(da) to hold that the appellant was a trafficker in the particular proscribed drug. In other words the learned judge had breached the rule against double presumptions laid down in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. We have carefully scrutinised the way in which the learned judge directed himself on the law and the evidence and we find no justification in the criticism levelled against his approach to the case. It is quite apparent that the learned judge appreciated this to be a case where there was direct evidence of trafficking and it is to that evidence that he directed his mind. It was only after he had determined as a fact that the appellant was actually trafficking the heroin found in her possession that he proceeded to convict her.

[25] In our judgment, the learned judge's approach is amply supported by the judgment of Lord Diplock in *Ong Ah Chuan v PP* [1981] 1 MLJ 64 where his lordship dealt with what trafficking involved as a matter of law. First, his lordship made it clear that passive possession or self consumption is not trafficking. He said:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph
>
> (a) of the definition of 'traffic' and 'trafficking' in s 2

[26] In two later passages his lordship explained what constituted trafficking. The first passage is an extrapolation of the passage already quoted above. It reads:

> So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under s 6 but does not amount to the offence of trafficking under s 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find.

[27] In the second passage, his lordship, while referring to the definition of trafficking in the Singapore Misuse of Drugs Act 1973 said:

> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.
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> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, *in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the*

absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:

(1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether that purpose was achieved or not. This is the effect of the provisions of section 3(c) and section 10.

(2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption. (Emphasis added.)

[28] After *Cohen Lorraine Phillis & Anor v Public Prosecutor* [1989] 3 MLJ 289 and *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337 it is settled that the passages we have quoted from Lord Diplock's judgment apply with equal force to cases arising in our jurisdiction. See *Looi Kow Chai v Public Prosecutor* [2003] MLJ 65.

[29] Applying Lord Diplock's common sense test to the present case it is clear beyond a reasonable doubt that the appellant was transporting the

heroin from Thailand to this country. There was not the slightest suggestion that it was for her personal consumption, although we must say that in the light of all the evidence, including the quantity of the drug involved, such a suggestion would have sounded hollow. So, the compelling inference is that her purpose in transporting the drug was to convey it to someone else either the actual consumer or a distributor or another dealer. Nothing in the appellant's testimony went anywhere near to rebutting this natural inference, arising independent of any presumption under the Act. As we have already said, her evidence was, as correctly found by the judge, lacking in credence. Having failed to raise even a reasonable doubt as to the true purpose for which she was transporting the drug when she was apprehended, the appellant was rightly found guilty of trafficking by the learned judge.

[30] For the reasons already given the appeal was dismissed and the conviction and sentence affirmed.

Appeal dismissed.

Reported by Peter Ling